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No. 92-687

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In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Deputy Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that a paid union organizer applying for a job with an employer he intends to organize is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act and thus protected against discrimination by that employer because of his union activity and affiliation.

2. Whether the Board's finding that petitioner violated the Act by refusing to hire union organizer Michael Hendrix because of his union activities is supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 968 F.2d 1327. The decision and order of the National Labor Relations Board (Pet. App. A9-A14), including the recommended order of the administrative law judge (Pet. App. A15-A47), is reported at 303 N.L.R.B. No. 33.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1992. The petition for a writ of certiorari was filed on October 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a multi-state electrical contractor headquartered in Willmar, Minnesota. In the summer of 1988, petitioner received an electrical subcontract for a J.C. Penney store in a mall in Silverdale, Washington. Pet. App. A10, A17. Michael Hendrix is a journeyman electrician. On June 23, 1988, Hendrix became a full-time field organizer for the International Brotherhood of Electrical Workers, Local Union No. 46 (the Union). *Id.* at A10, A18. Shortly thereafter, Hendrix contacted petitioner's operations manager, Timothy Imdieke, and asked whether petitioner would enter into a labor agreement with the Union for the Silverdale project. Hendrix sent Imdieke a copy of the Union's standard agreement. On July 25, Imdieke informed Hendrix that petitioner was not interested in signing an agreement, but might be interested in hiring some of the Union's people. *Id.* at A18.

On August 30, Hendrix went to the Silverdale site and introduced himself to Project Foreman Douglas Rose. Hendrix asked about job prospects and whether petitioner might sign an agreement with the Union. Pet. App. A18-A19. Rose responded that "things were really slow." *Id.* at A19. Following that conversation, Rose wrote in his job log for that date that Hendrix had given him the impression that the Union had "targeted [petitioner] for the infiltration of Union members." *Ibid.* Thereafter, Hendrix and Rose had several conversations in which Hendrix continued to ask about jobs. Rose advised Hendrix that petitioner would get its applicants through the state employ-

ment service and that it was "nonunion and wanted to stay that way."[1] *Id.* at A20.

On October 14, Hendrix delivered his own and another electrician's completed job applications to Rose. Pet. App. A20. Hendrix's application listed his present employer as the Union. His stated reason for leaving was to "work in the field." Pet. App. A3. According to Hendrix's credited testimony, it was normal for field organizers to seek employment. While union officials knew about his application for employment with petitioner, he testified that he had received no directions from the Union to seek that employment. Hendrix further testified that he would have to take a leave of absence from employment with the Union if hired by petitioner, while retaining his title as field organizer; that he would be paid by petitioner for the work performed for it; and that, while his wages with petitioner would be less than he was currently receiving from the Union, he did not know whether the Union would compensate him for any shortfall in compensation. *Id.* at A10-A11; C.A. App. 34, 37-38, 39-39A.

Between November 30 and December 15, 1988, Hendrix and two others picketed the Silverdale project with signs stating that petitioner was paying substandard wages. They also distributed leaflets at the site. Pet. App. A22-A23.

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[1] Similarly, in interviewing electrician Jerry Jones for a job at Silverdale, Rose asked about his union affiliation. When Jones replied that he was discontented with the Union and was no longer a member, Rose stated that Jones did not have to worry because petitioner was "nonunion and it intends on staying nonunion." Pet. App. A22.

On December 30, Hendrix called Rose to ask whether he was hiring and whether he had considered Hendrix's application. Rose responded that petitioner was hiring, but had not considered Hendrix's application because "it's kind of hard to hire you when you're out there on the other side, picketing." Pet. App. A25. Hendrix replied that he was no longer picketing, he was experienced in the type of work that petitioner was doing, he would do a good job, and he wanted Rose to consider his application seriously. Hendrix also indicated that, if hired, he would perform his duties as an electrician during working time and would engage in organizing activities during the lunch hour and after work. *Id.* at A25-A26. Petitioner never offered Hendrix a job.[2]

2. The Board, in agreement with the administrative law judge (ALJ), concluded that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by refusing to hire Hendrix.[3]

The Board reaffirmed its position in *H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), enforcement denied, 886

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[2] Petitioner also rejected the employment application of union electrician Allen Haugen after interviewing him and learning that he had previously worked for unionized employers. Pet. App. A23-A25.

[3] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right "to form, join, or assist labor organizations." 29 U.S.C. 158(a)(1), 157. Section 8(a)(3) makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization * * *." 29 U.S.C. 158(a)(3).

F.2d 70 (4th Cir. 1989), that "individuals who are full-time paid union organizers while applying for a job are protected Section 2(3) employees who cannot be discriminatorily denied employment simply on the basis of that union activity or status."[4] Pet. App. A11-A12. While stating that an employer may rely on a nondiscriminatory policy in refusing to hire an organizer, such as a policy against hiring those who seek short-term work or who work for other employers, the Board agreed with the ALJ that petitioner "did not prove that it refused to hire Hendrix pursuant to any such nondiscriminatory policy." *Id.* at A12 n.2.

The Board affirmed the ALJ's finding that petitioner had refused to hire Hendrix because of Hendrix's protected union activities. The ALJ's finding relied on, *inter alia*, petitioner's "policy

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[4] Section 2(3) of the Act, 29 U.S.C. 152(3), provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

against hiring known union members," Pet. App. A37, its intent to stay "nonunion," and its perception of Hendrix "as an organizational threat." *Id.* at A38. The ALJ further found that petitioner had not sustained its *Wright Line* burden of showing that it would have refused to hire Hendrix even in the absence of his union activities.[5] The testimony of petitioner's agents that they refused to take Hendrix's "application seriously" because he had applied as a result of "his full-time union employment responsibilities" constituted "an admission o[f] improper motive." *Id.* at A39.[6]

The Board ordered petitioner, *inter alia*, to offer Hendrix immediate employment and to reimburse him for lost earnings and benefits. Pet. App. A14, A42.[7]

3. The court of appeals rejected petitioner's contention that a paid union organizer is not an "employee" covered by Section 2(3) of the Act, and it enforced the Board's order. Pet. App. A1-A8. The

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[5] Under the Board's decision in *Wright Line*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), once the Board's General Counsel has shown that an anti-union motive animated the employment decision, the employer can defend by showing it would have made the same decision in any case. See also *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983) (upholding Board's *Wright Line* approach).

[6] The ALJ found no substance to petitioner's assertion that it thought Hendrix was only interested in a foreman's position. Pet. App. A39.

[7] The Board also affirmed other uncontested findings of the ALJ with respect to other violations the Act, Pet. App. A9, A41-A42, which petitioner did not challenge in the court of appeals, *id.* at A3, and does not challenge here.

court first noted that applicants for employment are employees within the meaning of the Act. Pet. App. A4, citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). It further noted that, "despite Hendrix's employment ties to the union, there is no real claim that Hendrix's hoped-for job with Willmar would have been a sham," and that, "[i]n most respects, Hendrix would have been indistinguishable from a zealous volunteer who resolved to use his free time during lunch and after work to advance the union's interests." Pet. App. A4. The court acknowledged, however, that Hendrix's "then-current job with the union," "his retention of a vague union title," and "his prospect of reemployment by the union might have had various subtle (or perhaps not so subtle) effects on his conduct as a Willmar worker." *Ibid.* Accordingly, the court stated that "[t]he nub of the controversy is whether Hendrix's employment ties to the union disqualified him from being a Willmar employee enjoying full protection of the Act." *Ibid.*

Applying the analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court concluded that Congress had not "clearly resolved the issue" of whether the term "employee" as used in the Act encompasses paid union organizers. Pet. App. A4. The court explained that, "[a]s moonlighting is widespread, it is plain that the word 'employee' cannot exclude concurrent employment generally. Once that (obvious) step is taken, it is hard to see how one could exclude employment by a union as well as another employer except on grounds either of some implication from the structure of the Act or some powerful legislative history." *Id.* at A4-

A5. The court found no such evidence, however. On the contrary, it found that "closely related legislation, the Labor Management Relations Act, manifests a congressional assumption that an employee may be employed by a union and another entity." *Id.* at A5.[8]

The court also noted that this Court had "recently stated a presumption that a statutory use of the term 'employee' should be taken to have its common law meaning unless Congress 'clearly indicates otherwise.'" Pet. App. A5, quoting *Nationwide Mutual Insurance Co.* v. *Darden*, 112 S. Ct. 1344, 1349 (1992). Under common law principles, the court found, a person can serve two masters, so long as "service to one does not involve abandonment of the service to the other." *Id.* at A6, quoting Restatement (Second) of Agency § 226 (1958). The court added that, "[u]ntil such time as an employee 'abandons' the non-union employer for the union employer, it is hard to see why he should be denied the protection of the Act." *Ibid.*

The court then rejected petitioner's arguments against applying Section 2(3) of the Act to paid union organizers. First, in response to petitioner's contention that the organizer's "employment relation to the union would subject [the employer] to intolerable risks of disloyalty," Pet. App. A6, the court noted that nothing in the Act prevents an employer from disci-

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[8] The court referred (Pet. App. A5) to Section 302 of the Labor-Management Relations Act (LMRA), which, although it generally prohibits payments from an employer to an employee of a union, excepts from that ban payments made "to any * * * employee of a labor organization, who is also an employee * * * of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1).

plining or discharging an employee for disloyalty. The court emphasized, however, that if the disloyal employee "is also a union member and proves that the employer fired him for organizing activity, the employer may not evade the *Wright Line* rule by saying that [disloyal persons] are not 'employees'; it must prove that it would have fired [them] even if [they] hadn't been engaged in union-related activities." *Id.* at A7.[9]

Second, the court rejected petitioner's claim that the risk that an organizer might participate in a vote on union representation constituted "a reason to deny [him] the protection of the NLRA at the hiring stage." Pet. App. A7. The court observed that even if the organizer qualified as an "employee" and was hired, he may not be eligible to vote; "he could be included in a bargaining unit only if found to share the necessary community of interest with other workers." *Ibid.*

Third, the court saw no conflict between according "employee" status to a paid organizer who applied for a job and the principle that nonemployee organizers have only limited rights of access to employer property for organizational purposes. See *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). The court acknowledged that the organizer's "employment would give him a better perch from which to propagandize," but pointed out that the same "would be true for any

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[9] Earlier in its opinion, the court noted that petitioner had not sought to defend its refusal to hire Hendrix—which the Board found was motivated by his union activities—under the *Wright Line* rule. Pet. App. A2; see also note 5, *supra*.

union zealot who got a job with [the employer]." Pet. App. A7.

Accordingly, the court held that "the NLRB could reasonably determine that Hendrix or anyone else who is employed simultaneously by a union and a company is an 'employee' under § 2(3) of the Act." Pet. App. A8. The court left "to another day the issue of when employment ties to a union establish such a risk of disloyalty that the (non-union) employer can reject or dismiss the union employee on that ground." *Ibid.*

ARGUMENT

The court of appeals correctly upheld the Board's longstanding rule that a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3), and is therefore protected against discrimination because of his union activities and affiliation. Because that principle has been rejected by other courts, however, and because the question is a recurring one in the administration of the Act, we do not oppose this Court's review of that issue.[10]

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[10] The third question presented by the petition is subsumed within the issue of whether a paid union organizer is a statutory "employee"; it simply recasts that issue in terms of whether the treatment of a paid union organizer as an employee (who is therefore protected against discrimination by the employer) is consistent with the "policies underlying the Act." Pet. i. The second question presented, however, raises a distinct issue: whether the perceived risks that a paid union organizer would be disloyal to the employer may justify the employer's rejection of such a person's job application on that ground under Section 8(a)(3) and (1) of the Act. The court of appeals correctly held, Pet. App. A8, that this case does not

1. Petitioner contends (Pet. 11-16, 19-21) that the court of appeals erred in upholding the Board's rule that a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). That contention is incorrect.

As this Court has often explained, Congress gave the Board the "primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); see, *e.g.*, *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). When the Act does not speak directly to an issue, the Court accords "considerable deference" to the Board's interpretation and will uphold it if it is "rational and consistent with the Act." *Curtin Matheson*, 494 U.S. at 786-787; *NLRB* v. *Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under those principles, the court of appeals correctly upheld the Board's rule in this case.

a. The statute does not specifically address the application of the Act to paid union organizers who apply for work with an employer, while retaining an affiliation with the union and intending to engage in organizational activity. The definition of "employee" broadly includes "any employee," 29 U.S.C. 152(3), subject to six specific exclusions, see note 4, *supra*, and there is no express exclusion for paid union

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present that issue, see pp. 20-21, *infra*. We therefore do not believe that review should be granted on the second question presented.

organizers who apply for jobs with other employers.[11] This Court has indicated that common law principles inform the interpretation of the term "employee" unless Congress "clearly indicates otherwise." *Nationwide Mutual Insurance Co.* v. *Darden*, 112 S. Ct. 1344, 1349 (1992) (construing ERISA; referring to other statutes, including the National Labor Relations Act). The common law, however, does not impose a per se prohibition against dual employment. As the court of appeals noted, "[u]nder common law principles, '[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.' " Pet. App. A6, quoting Restatement (Second) of Agency § 226 (1958), and citing *Kelley* v. *Southern Pac. Co.*, 419 U.S. 318, 324 (1974). Nothing in the text of the Act, therefore, excludes paid union organizers applying for a job from the class of "employees."

b. The Board has determined, as an exercise of its authority to interpret the Act's provisions, that paid union organizers do come within the scope of the term "employee" under the Act. That position is of long duration, see *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975), and has been adhered to consistently. In two

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[11] See *Sure Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984) (the "breadth of § 2(3)'s definition is striking; the Act squarely applies to 'any employee.' The only limitations are specific exemptions" in the statute). It is well established that an applicant for work is considered to be an "employee" under the Act, see *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), and is therefore entitled to the protection of the antidiscrimination provisions of the Act.

recent decisions, the Board thoroughly reexamined the issue and reaffirmed its view that the Section 2(3) definition of "employee" covers paid union organizers. *Sunland Construction Co.*, 309 N.L.R.B. No. 180 (Dec. 16, 1992), pet. for review pending *sub nom. International Bhd. of Boilermakers* v. *NLRB*, No. 92-1667 (D.C. Cir., filed Dec. 30, 1992); *Town & Country Electric, Inc.*, 309 N.L.R.B. No. 181 (Dec. 16, 1992), pet. for review pending, No. 92-3911 (8th Cir., filed Dec. 23, 1992).

As the Board explained in *Sunland*, affording the Act's protection to paid union organizers furthers the policies of the Act. "The right to organize is at the core of the purpose for which the statute was enacted." *Sunland*, slip op. 12; see *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1541-1542 (1991). A flat rule that an employer may reject an applicant based on its hostility to that person's desire to organize the workforce is antithetical to that core purpose. *Sunland*, slip op. 12.

The Board added that protecting paid union organizers against discrimination based on their union activity does not interfere with any legitimate management right. *Sunland*, slip op. 12, citing *Phelps Dodge*, 313 U.S. at 182. The Board noted that the employer may prohibit any employee, including paid organizers, from engaging in union activity during working time, but "[o]utside work time, * * * the organizer—like other workers—is free to solicit for the union." *Id.* at 12-13, citing *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). The Board also rejected the argument that its position could lead to "unions packing bargaining units with their paid

functionaries." *Sunland*, slip op. 13. Under Board policy, "employee status is not synonymous with voter eligibility," and paid union organizers are excluded from voting where they are "temporary employees" or they do not share a community of interests with fellow employees. *Ibid.* The Board also reiterated that "employers may lawfully refuse to hire individuals seeking temporary employment, where the refusal is based on neutral hiring policies, uniformly applied." *Id.* at 13 n.33.

The Board further rejected the claim that according employee status to paid union organizers is incompatible with "the adversary relationship between employer and union." *Sunland*, slip op. 13. That argument assumes that "paid union organizers will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer's legitimate interests." *Id.* at 14. The Board explained, however, that:

> The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.

Ibid. The Board emphasized that paid union organizers would be subject to the same disciplinary rules as any other employee, and concluded that, absent objective evidence, there was no reason for inferring that, "if hired, paid union organizers will engage in

activities inimical to the employer's operations." *Id.* at 15.[12]

c. In light of its careful weighing of the labor-relations interests involved, the Board's determination that paid union organizers are covered by Section 2(3) is certainly a rational one. It is also consistent with the provisions of the Act. Contrary to petitioner's contention (Pet. 14-15), the Board's rule in this area does not conflict with *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). As the Board noted in *Sunland*, those cases "address the lawful restrictions that employers can place on nonemployees" with respect to access to private property; they do not "interpret Section 2(3)" or suggest that property rights can be used to justify invasion of otherwise-protected activity by employees. *Sunland*, slip op. 14. The court of appeals reached the same conclusion. Pet. App. A7.

In sum, the court correctly deferred to the Board's rule that paid union organizers are Section 2(3) employees. Two other circuits have upheld the Board's interpretation of the Act. *Escada (USA)*,

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[12] The Board in *Sunland* went on to consider whether the employer's refusal to hire an organizer who applied for work during a strike of the employer by his union violated Section 8(a)(3) and (1) of the Act. The Board held that, in the strike setting, the refusal to hire was not unlawful discrimination. Slip op. 16-17. *Sunland* thus illustrates that the Board's approach permits room for legitimate employer interests to prevail against a discrimination claim by an union organizer who applies for a job; petitioner's approach, in contrast, would resolve each and every case by denying the organizer protection.

Inc. v. *NLRB*, 970 F.2d 898 (3d Cir. 1992), enforcing mem. 304 N.L.R.B. No. 109 (Aug. 27, 1992); *NLRB* v. *Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979) (rejecting the claim that " 'a paid union infiltrator' is not a *bona fide* employee under the Act," but denying enforcement on substantial evidence grounds).

2. Petitioner contends (Pet. 8-11) that the court of appeals' decision conflicts with *H.B. Zachry Co.* v. *NLRB*, 886 F.2d 70 (4th Cir. 1989), and *NLRB* v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). Although those cases are factually distinguishable from this one, we agree that the decisions rest on irreconcilable principles, and create a conflict in this field that warrants this Court's review.

a. In *Zachry*, a paid union organizer applied for work as a welder while intending to remain on the union payroll and receive other benefits from the union. The employer refused to hire him "because he was a union organizer," 886 F.2d at 72, and because he was seeking employment in order to organize the plant. The Board concluded that the employer had committed an unfair labor practice, but the Fourth Circuit denied enforcement. In rejecting "the reasoning of *Oak Apparel*[, 218 N.L.R.B. 701 (1975)] and its progeny," *id.* at 75, the court of appeals concluded that a paid union organizer could not be considered a bona fide "employee" for purposes of the Act because "[a]n employee is a person who while on the job works under the direction of a single employer," and a paid union organizer in effect works "for two different employers at the same time and for the same working hours." *Id.* at 73. *Zachry* also declared that to give paid union organizers employee protection under the

Act would require the employer to subsidize and permit use of its property to further a union's organizational efforts, contrary to *Babcock & Wilcox*, *supra*. 886 F.2d at 74-75.

This case, of course, involves different facts than *Zachry*.[13] Indeed, the Board's opinion suggested that those distinctions might have made a difference under *Zachry*.[14] The court of appeals, however, in enforcing the Board's order, put no weight on those distinctions. Rather, the D.C. Circuit stated that even if petitioner had "made out so powerful a case of

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[13] In *Zachry*, the Fourth Circuit stressed that the applicant intended to remain "in the concurrent employment of another employer," *viz.*, the union, and stated that its holding was a "circumscribed" one, applicable to the situation in which the "job applicant [would be] simultaneously paid and supervised by another employer." 886 F.2d at 75. Here, Hendrix would have taken a leave of absence from the Union (while retaining the position of "field organizer"); would not have been directed by the Union during his working hours with petitioner; and would not necessarily have resumed employment with the Union at the conclusion of the organizing campaign. Pet. App. A11, A13.

[14] The Board stated that it had reviewed *Zachry* and determined to adhere to the position that paid union organizers were "employees," but it also noted "this case is factually distinguishable from *Zachry* on points critical to the Fourth Circuit's determination that the paid union organizer there should be excluded from the statutory definition of employee." Pet. App. A12. The Board explained that "there is no affirmative evidence that Hendrix planned to remain concurrently employed, directed, or compensated by the Union for time spent working for [petitioner]," and the facts therefore did not raise the "same concerns about divided employment loyalties and interests which underlay the Fourth Circuit's conclusion in *Zachry*." Pet. App. A13.

[Hendrix's] likely disloyalty" that the Board would have been required to uphold a discharge for *that* reason, Pet. App. A6, it would not have deprived Hendrix of "employee" status under Section 2(3). Pet. App. A7.

The D.C. Circuit's disagreement with *Zachry* is evident at every stage of analysis. While *Zachry* stated that "the term 'employee' contemplates an employee working under the direction of a single employer," 886 F.2d at 73, the D.C. Circuit concluded the term "employer" can embrace dual employment. Pet. App. A6. And, whereas *Zachry* believed that extending "employee" status to an organizer would conflict with *Babcock & Wilcox*, 886 F.2d at 74, the D.C. Circuit saw "no conflict" between *Babcock & Wilcox* and this case. Pet. App. A7. Finally, *Zachry* expressed concern that a paid union organizer's vote might improperly tip the balance in favor of union representation, 886 F.2d at 74-75, but the D.C. Circuit recognized that the Board can address that concern in defining the bargaining unit; it is not a basis to deny coverage of the Act "at the hiring stage." Pet. App. A7. Accordingly, the analysis in *Zachry* cannot be reconciled with the approach of the Board and the rationale of the D.C. Circuit in this case.

b. In *Elias Brothers*, a union organizer was found to have been employed by the union and to have sought employment as a waitress for the purpose of organizing the employees; during her employment, the waitress received $15 per week from the union. 327 F.2d at 423, 427. The Sixth Circuit stated that, on those facts, the organizer "was not a bona fide employee within the intent of § 2(3) of the Act" and

was therefore not entitled to protection against anti-union discrimination in firing decisions. 327 F.2d at 427.[15] The differences between Hendrix's situation and the organizer in *Elias Brothers* are differences of degree rather than kind; both organizers retained (or would have retained) affiliation with their unions, and both sought the jobs because of their desire to engage in organizing the employer's workforce. Under *Elias Brothers*, Hendrix would likely have been denied "employee" status pursuant to the Act.

c. The discord in the circuits on this issue is likely to persist absent this Court's intervention. The Board recently reexamined the issue in light of *Zachry*, and made clear its rejection of that decision. See *Sunland*, slip op. 11, 13-15; *Town & Country*, *supra*. Moreover, while there are factual variations in the decided cases, those variations do not undercut the disagreement in the courts on the underlying question whether paid union organizers qualify as "employees." Because the issue is a recurring one that is important to the administration of the Act, we do not oppose review of the question whether a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act and thus entitled to the Act's protections.

3. Petitioner contends (Pet. 16-19) that, even if a paid union organizer is an "employee," an employer

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[15] The court of appeals also rested its decision on the ground that the employee had left voluntarily, rather than being discharged. The court concluded that the waitress so lacked credibility that the court was justified in rejecting her testimony and in finding that she had given notice to the employer. 327 F.2d at 427.

may nonetheless, without violating Section 8(a)(3) and (1) of the Act, refuse to employ such an organizer on the ground that his employment would entail too great a risk of disloyalty. In our view, that issue is not presented here.[16]

The court of appeals sustained the Board's finding that petitioner rejected Hendrix's application, not out of concern that he would be a disloyal employee, but simply because it was opposed to a union and union efforts to organize its employees. The court of appeals noted that under the Board's *Wright Line* test, see note 5, *supra*, petitioner could have defended its refusal to hire Hendrix by showing that "it would have rejected him without regard to those aspects of his relation to the union that the Act protects (e.g., membership, protected union activities)," but it failed to do so. Pet. App. A2. The court therefore left "to another day the issue of when employment ties to a union establish such a risk of disloyalty that the (non-

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[16] Petitioner's contention is also incorrect. See *Sunland*, slip op. 17 n.41 ("we would not permit an employer to presume generally that paid organizers will be disloyal employees"). If such a presumption were permissible, the logical next step would be to allow an employer to presume that *any* committed union member would be "disloyal." A presumption "that loyalty to a union is incompatible with an employee's duty to the employer," however, is "at war" with the basic premise underlying the Act. *Id.* at 14. An employer must establish particularized concerns of disloyalty to justify a refusal to hire. "[S]eparable acts of insubordination, disobedience or disloyalty" are not protected activity under the Act. *NLRB* v. *Local 1229, IBEW*, 346 U.S. 464, 475 (1953) (handbills attacking employer's product with no discernible relation to a labor dispute are unprotected).

union) employer can reject or dismiss the union employee on that ground." *Id.* at A8.

This record, therefore, does not raise any issue concerning whether an employer can justify its refusal to hire an organizer because of concerns about disloyalty. The only question presented respecting petitioner's motive for refusing to hire Hendrix is whether substantial evidence supports the Board's finding that Hendrix was rejected solely because of his union activities. That evidentiary issue does not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

CONCLUSION

The government does not oppose review of the question whether a paid union organizer is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (Questions (1) and (3), Pet i). As to second question presented, the petition for a writ of certiorari should be denied.

WILLIAM C. BRYSON
Acting Solicitor General

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Deputy Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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